INDEX.

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement of the Case	2
Facts Regarding Prior Proceedings	8
Specifications of Errors to Be Urged	9
Reasons for Granting the Writ	10
Appendix A	15

TABLE OF CASES.

Bram v. *United States*, 168 U.S. 532	10
In re Fried, 161 F. (2) 543 (CCA 2, 1947), *cert. granted*, 311 U.S. 804; *writ dismissed*, 332 U.S. 807	10
Hopt v. *Utah*, 110 U.S. 574	10
In re Liebster, 91 F. Supp. 814 (D.C., E.D., Pa. 1950)	11, 12
U. S. v. *Levy*, 99 F. Supp. 529 (D.C. Conn. 1951)	12
U. S. v. *Lustig*, 163 F. (2) 85 (CCA 2, 1947	12
U. S. v. *Weisman*, 78 F. Supp. 979 (D.C. Mass. 1948)	12
Wan v. *United States*, 266 U.S. 1.	10
Watts v. *United States*, 338 U.S. 49	10
White v. *United States*, 194 F. (2) 215 (CA 5, 1952), *cert. denied*, 343 U.S. 930	11
Wilson v. *United States*, 162 U.S. 613	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No.

ANTHONY A. CENTRACCHIO, *Petitioner,*

v.

GEORGE F. GARRITY, United States Attorney,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on July 25, 1952.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court are in the Record at page 7 and were not reported. The Opinion of the Court of Appeals (R. 53) is not yet reported.

JURISDICTION

The jurisdiction of the Supreme Court to review this case rests upon 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. May the United States Government use evidence in a criminal proceeding for tax evasion against a taxpayer who has delivered such evidence to United States Treasury Department agents in full compliance with and in reliance on the publicly-announced "voluntary disclosure" policy of the Treasury Department? Or, is such conduct a violation of the taxpayer's rights under the Fifth Amendment to the Constitution?

2. May United States Treasury agents secure facts and information from a taxpayer regarding income tax evasion by expressly and implicity representing to the taxpayer that there will be no criminal prosecution if he fully discloses his wrongdoing and then, when full disclosure has been made, use such facts and information in criminal proceedings against him for tax evasion? Or is such conduct a violation of the taxpayer's rights under the Fifth Amendment to the Constitution?

3. Should a United States Attorney who is about to present evidence and information, obtained under the circumstances outlined above, to a grand jury for the purpose of securing an indictment of the taxpayer be restrained from so doing and should such evidence be suppressed?

STATUTES INVOLVED

The pertinent statutory provisions are printed in Appendix A to this petition, pages 15 and 16.

STATEMENT OF THE CASE

At the hearing in the United States District Court, the following facts were testified to by the petitioner:

In November, 1949 in his law office, he first met William T. Lindberg, Special Agent of the Intelligence Unit of the United States Treasury Department in Boston. Lindberg

informed the appellant that he was investigating the tax liability of a certain third party and had found cancelled checks made payable to the petitioner. Lindberg stated that he wished to know what the nature of these payments was. The petitioner stated that they represented loans, all of which had been repaid.

As a result of this conference, and at Lindberg's request, the petitioner produced his cancelled checks showing repayment to the third party. Lindberg had taken these checks with him for examination and on May 18, 1950 he came to the petitioner's office for the sole purpose of returning these documents.

Lindberg at this time indicated that the matter was closed but in the course of an informal conversation, just as Lindberg was leaving the office, he volunteered the information that his department was primarily interested in collecting money for the government, not in securing convictions, and that they had a method whereby delinquent taxpayers could come in and "square" themselves with the government. The petitioner then inquired about that method and said that he would like to take advantage of it since his returns were not in order. Lindberg in his presence then made a phone call to his superior, John W. Cleary, and an appointment was made for May 22, 1950.

Thereafter, the petitioner retained an accountant, Francis H. Sloan, and on May 22, 1950 he went with him to the offices of the Intelligence Unit. The following conversation took place with Lindberg, Cleary, Sloan and the petitioner present (R. 16):

> "He (Cleary) said, 'What have we here?' I said, 'I am Mr. Centracchio.' He says, 'Yes.' So he looked at Mr. Lindberg and he says, 'What is it?'
>
> "I said, "Don't you know he called you from my

office and made this appointment?' He looked at Mr. Lindberg and he said, 'Is that so?' Mr. Lindberg blushed, sort of, and he said, 'Yes.'

"So he said, 'Well, what is it you want?' Mr. Sloan said, 'Why, we have come here to make a voluntary disclosure.' So Mr. Cleary says, 'Well,' he says, 'I do not see how you can do that.' And Mr. Sloan said, 'Well, I don't see why not; there hasn't been an entry made.'

"So Mr. Cleary turned to Mr. Lindberg and he says, 'Is that so?' So Mr. Lindberg said, 'I have made none.' So then Mr. Cleary put his head down in his hands like this (demonstrating) and after a few moments he looked up and he said, 'Well,' he says, 'I won't quibble with you. If it is a voluntary disclosure, it is a voluntary disclosure. How do you suggest we best do it—' or before he said that, he says, 'What does it run to, anyhow?' So Mr. Sloan said, 'Well, from a preliminary examination I think it runs to $50,000, maybe more, maybe less.'

"I says, 'Wait a minute, it doesn't run to that, it can't.' I says, 'Any money I have earned I have taken home.' I says, "It can't be that and I know how I live.'

He says, 'Whatever it is.' He said, 'How do you suppose it is best to do it,' says Mr. Cleary. He said, 'Well,' he said, 'I suggest that we do it by a net worth.' I misunderstood and thought they said 'net work.' I said, 'What does net work have to do with this?' So they all laughed, Mr. Lindberg, Mr. Cleary and Mr. Sloan, and explained that net worth is what you are worth on a certain day and what you are worth on another day and things like that, so then Mr. Sloan said, or Mr. Cleary said, 'How long will it take you?' Sloan said, 'About six weeks, probably.'

"He says, 'Oh,' he said, 'why don't you take about four weeks, a month,' he says, 'and then report, let me know how far you have gotten along.' So then Mr. Sloan said, 'Well,' he said, 'Do I have to clear it with you or who shall I clear it with?' He says, 'No, you work along with Mr. Lindberg and if you have any problems come in and let me hear from you.'

(R. 32) " 'How come,' he says, 'you haven't brought a lawyer?' I says, 'Well, I haven't brought a lawyer because Mr. Lindberg says it is a question of figuring.' He says, 'You did the right thing,' he says, 'Lawyers can't do anything in cases down here.' He says, 'This is an accounting problem,' and he says, 'You have got an accountant, that's fine.' He says, 'You know, lawyers have missed this field.' I says, 'I am not in the field. I don't know anything about it.' "

The phrase "voluntary disclosure" used by Sloan and referred to by Lindberg and Cleary at that time characterized the established and well publicized official United States Treasury Department policy of not prosecuting income tax violators who made disclosures of their wrongdoing prior to a commencement of an investigation of them by the Department. The District Court, by agreement of the petitioner and the respondent, included as part of the record the declaration of the then Secretary of the Treasury, Fred M. Vinson, made on August 21, 1945 as follows:

"The Commissioner of Internal Revenue does not recommend criminal prosecution in the case of any taxpayer who makes a voluntary disclosure of omission or other misstatement in his tax return. Monetary penalties may be imposed for delinquency, for negligence and for fraud, but the man who makes a dis-

> closure before an investigation is under way protects himself and his family from the stigma of a felony conviction. And there is nothing complicated about going to a collector or other revenue officer and simply saying, 'There is something wrong with my return and I want to straighten it out'." (R. 3)

After the meeting in Cleary's office, the petitioner and his accountant turned over all of his checkbooks, bank statements, savings account books and other documents and records to Lindberg.

In August of 1950, Lindberg asked to examine all of the petitioner's legal case files and the petitioner objected. He told Lindberg and later Cleary that he was doubtful as to whether he could ethically turn over to him his files. Both Cleary and Lindberg stated that a refusal to turn over these files was failure to "cooperate". (R. 21)

At this time, the petitioner sought advice from Mr. David Kelleher, the Special Agent in Charge of the Intelligence Unit of the Bureau of Internal Rvenue. Mr. Kelleher advised the petitioner that there was no ethical problem involved and told him that if he failed to cooperate with the agents he would lose his "status" and then he would be in "trouble". (R. 23) Kelleher further stated that the petitioner was "going along all right" and "it's all right, you are all set. This thing will be over before you know it." (R. 24) Other conversation followed in which the petitioner asked whether he could avoid paying the monetary penalty since he was "bringing this whole thing through." Mr. Kelleher stated that that penalty would have to be paid regardless. (R. 24)

Thereafter, the petitioner delivered all of his legal case files for the years requested to the agents and he discharged his accountant since he believed his services were no longer

needed. At different times thereafter the petitioner turned over other requested lists of expenses and schedules and on February 16, 1951, after all of the documentary evidence had been delivered and examined by the agents, the petitioner gave a statement under oath, at which time the following conversation took place.

> "He (Cleary) says, 'You waive your constitutional rights?' I says, 'You know the promise you made, not cooperating. . . . I haven't lost anything. I am cooperating.' He says, "All right, that will come in later' . . . He says, 'You waive your constitutional rights,' 'The way you are talking,' I says, 'Yes, you can put it down in the record but remember.' " (R. 28)

On April 12, 1951, the petitioner upon his own motion paid a call upon Mr. Kelleher and at this time asked him when he would get his bill. He had on frequent occasions addressed this query to the other agents and had always been assured that he would get a bill, and on April 2, 1951 Mr. Cleary had told him that he would get his bill "pretty soon". (R. 28) At this time, Mr. Kelleher informed the petitioner that he should retain a lawyer. At no time during the investigation had the petitioner ever been advised that the information in the documents and records which he delivered to the Treasury agents could be used against him in a criminal action. After examination, all of the records had been returned to the petitioner.

At the hearing in the District Court, the accountant, Francis H. Sloan, corroborated the petitioner's testimony in regard to the conversation in Cleary's office on May 22, 1950 to the effect that the matter would be handled as a voluntary disclosure and would result only in a monetary penalty. (R. 41-47)

Facts Regarding Prior Proceedings

On February 20, 1952, at about 9:40 A.M. the petitioner filed a petition and motion in the United States District Court for the District of Massachusetts, alleging that the United States Attorney, George F. Garrity, was about to seek an indictment against him for income tax evasion, based upon evidence and statements secured in violation of his constitutional rights by United States Treasury agents and officers who made explicit and implicit promises of immunity to the petitioner. The petition prayed that the United States Attorney be restrained from presenting such evidence to the Grand Jury and that the evidence be suppressed. (R. 6) Wyzanski, J., ordered that a hearing on the petition be held at 2:00 P.M. on that day and the United States Attorney was served with a copy of the petition and orally notified of the time of the hearing.

At the hearing the District Court heard only the testimony of the petitioner and his accountant, Francis H. Sloan, and then denied the petition and the motion. The District Court was of the opinion that the declaration of the Secretary of the Treasury of August 21, 1945 was merely a statement of general attitude of intention and that it did not amount to a declaration of immunity. The Court further held that the statement was merely a declaration of policy and that since there was no evidence that any Treasury agents had misrepresented their then present intention at any time during the investigation there was no evidence of a violation of the Fourth or Fifth Amendment to the United States Constitution. (R. 7)

On the following day, February 21, 1952, the U. S. attorney presented the evidence to the grand jury and the petitioner was indicted for tax evasion.

The Court of Appeals was of the opinion that the testimony of the petitioner did not disclose that any violation of

constitutional rights had yet been suffered and therefore the petition should have been dismissed for want of equity. (R. 53-64)

Specifications of Errors To Be Urged

The Court of Appeals erred:

1. In holding as a matter of law that the petitioner voluntarily delivered the evidence to the Treasury agents even though such delivery and disclosure were directly induced by the promises contained in the announced "voluntary disclosure" policy of the Treasury Department and by the express and implied promises of the Treasury agents that there would be no criminal prosecution.

2. In holding that petitioner had not suffered any violation of his constitutional rights under the Fifth Amendment to the Constitution of the United States despite the uncontradicted testimony that the evidence about to be presented to the Grand Jury had been produced by the petitioner in reliance upon promises of immunity from criminal prosecution by Treasury Department officers and agents.

3. In failing to hold that the evidence given by the petitioner to the agents of the Treasury Department was obtained in violation of his rights guaranteed under the Fifth Amendment in that the agents failed to advise the petitioner that the evidence he was giving could be used against him in a criminal prosecution.

4. In failing to hold that the United States Attorney should have been enjoined from presenting to a Grand Jury evidence produced by the petitioner in reliance on and in compliance with offers and promises of immunity from prosecution made by investigating agents and officers of the Treasury Department.

5. In holding that the petition and motion to suppress should have been dismissed for want of equity and remand-

ing the case to the District Court with directions to enter an order dismissing the petition on that ground.

Reasons for Granting the Writ.

1. The decision of the Court below is in conflict with the decisions of this court which hold that the Fifth Amendment to the Constitution forbids the use in evidence of confessions induced by promises of advantage.

Bram v. *United States*, 168 U.S. 532.
Wilson v. *United States*, 162 U.S. 613.
Hopt v. *Utah*, 110 U.S. 574.
Wan v. *United States*, 266 U.S. 1.
Watts v. *Indiana*, 338 U.S. 49.

2. The decision of the Court below is in conflict with *In re Fried*, 161 F. (2) 543 (CCA 2, 1947), *cert. granted*, 311 U.S. 804 *writ dismissed* (*on motion of pet.*) 332 U.S. 807. The *Fried* case involved a pre-indictment petition to suppress a confession obtained by physical coercion and the Circuit Court in a split decision held that such evidence, obtained in violation of the Fifth Amendment, should be subject to the same procedure as is expressly provided by Rule 41 (e) of the Federal Rules of Criminal Procedure for tangible evidence obtained in violation of the Fourth Amendment.

The Court below attempted to distinguish the *Fried* case on two grounds:

(a) A confession obtained by a promise of immunity is not a coerced confession (R. 60).

(b) A person's rights under the Fifth Amendment are violated at the time a coerced confession is ob-

tained whereas the Fifth Amendment would not be violated, if at all, until a confession given in response to a promise of immunity was used in evidence. (R. 62)

Your petitioner submits that (a) is a clearly erroneous proposition upon which no valid distinction can rest, for the reason that a confession obtained by a promise of immunity, is an involuntary confession and therefore coerced, and that (b) is a distinction without substance.

The *Fried* case has been followed in practice in the cases of *In re Liebster*, 91 F. Supp. 814 (D.C., E.D. Pa. 1950) and *White* v. *United States*, 194 F. (2) 215 (CA 5, 1952), *cert. denied*, 343 U.S. 930.

The instant case and the *Fried* case represent opposing opinions on an important matter involving the administration of federal criminal justice and procedures available for the assertion of a Constitutional privilege. This Court should take this opportunity to determine which of the conflicting views is the correct one.

3. The decision of the Court below is in conflict with *White* v. *United States*, 194 F. (2) 215 (CA 5, 1952), *cert. denied*, 343 U.S. 930. (Two justices were of the opinion that the writ should be granted.) The *White* case also involved disclosures alleged to have been made in reliance on the "voluntary disclosure" policy of the Treasury Department. The District Court and the Court of Appeals, however, had found as a fact that the petitioners had not made their disclosures prior to the commencement of an investigation and therefore had not come within the terms of the Treasury's offer. The Court of Appeals said:

"While we agree with appellants that if their in-

> criminating statements had been made as they claim, not voluntarily but induced by promises of immunity, they would be entitled to be relieved against their use, we think it plain that no such case is made out."

In the case at bar, the uncontradicted evidence established that the petitioner made his disclosures in full compliance with the terms of the Treasury's "voluntary disclosure" policy. Furthermore, the evidence showed express and implied promises made by agents of the United States Treasury Department to this petitioner that he would not be prosecuted.

If the facts in the case at bar had been present in the *White* case, *supra*, the rationale of that decision would have led to the granting of the pre-indictment petition to suppress.

In addition to the *White* case, there have been four other reported decisions involving the "voluntary disclosure" policy.

U. S. v. *Lustig*, 163 F. (2) 85 (CCA 2, 1947).
U. S. v. *Weisman*, 78 F. Supp. 979 (D.C., Mass. 1948).
In re Liebster, 91 F. Supp. 814 (D.C. E.D. Pa. 1950).
U. S. v. *Levy*, 99 F. Supp. 529 (D.C. Conn. 1951).

All of these cases are distinguishable from the case at bar in that there were findings that either the taxpayer was told his case was not a "voluntary disclosure" by the agents or an investigation had been commenced prior to the confession.

In the *Liebster* case, the court held that the petitioner was entitled to a pre-indictment order of suppression even though the investigation had been started prior to his dis-

closures because the petitioner had not known of this and had no reason to know it. In the case at bar, the only evidence before the court demonstrated that no investigation of the taxpayer had been commenced when he made his disclosure and that he complied in full with the Treasury Department offer as contained in the publicly broadcast "voluntary disclosure" policy.

4. The issues raised by the case at bar concerning the legal status and effect of the so-called "voluntary disclosure" policy of the United States Treasury Department are matters of extreme public importance. In 1945 the Treasury Department, in order to collect large sums of money due the government in taxes, made public announcements in the nation's press through the then Secretaries of the Treasury, Henry Morgenthau, Jr., and the Honorable Fred M. Vinson, that taxpayers who disclosed their evasion prior to a commencement of an investigation and paid their taxes and penalties would not be criminally prosecuted. The offer of immunity was couched in unequivocal language and it is clear that the Treasury Department officials felt that the privilege against self-incrimination would prevent the use of any information disclosed in response to their offer.[1] If this policy were merely a self-imposed administrative limitation prior to 1945 it lost that character when it was calculatedly publicized at the start of the Treasury's tax collection drive.[2] This court has again and again pointed out that our system of criminal law is accusatorial and not inquisitorial. On that premise defendants have consistently been afforded the protection of the Fifth Amendment against the use of confessions extracted by the

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[1]Proposals for Strengthening Tax Administration, Hearings Before House Ways and Means Sub-committee on the Administration of the Internal Revenue Laws (popularly known as the King Committee) January, 1952 Testimony of Mr. Schwartz of Penal Division of Bureau of Internal Revenue, p. 160-163.

[2]Hearings (p. 138-152), documentary history of voluntary disclosure policy.

use or threats of physical force. Is the situation any different where the confession has been induced by an official promise of immunity?

Although on January 10, 1952 the United States Treasury Department officially withdrew its "voluntary disclosure" offer,[3] many of the large number of fraud cases which it has referred to the Justice Department in 1951 and 1952 will involve the same issues presented here.[4] A large part of the testimony heard by the King Subcommittee hearings on tax administration dealt with the voluntary disclosure policy. It was disclosed that the Treasury Department and the Justice Department were in basic disagreement on the legal effect of a voluntary disclosure on a taxpayer's constitutional rights.[5] One of the chief reasons for discontinuing the policy was the uncertainty as to its effect and the consequent litigation which it has caused and would continue to cause until the status of the policy was somehow clarified.[6]

Respectfully submitted,

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[3]Treasury Department press release No. S-2930, January 10, 1952.

[4]On March 29, 1952, the Justice Department revealed that 450 tax evasion cases had been approved for prosecution by the Tax Division between November 1, 1951 and March 15, 1952. This was twice the number in any comparable period during the last two years. (*New York Times*, March 30, 195 , p. 60.)

Hearings (p. 159), Mr. Schwartz testified that the 'voluntary disclosure" issue is "raised in many cases and at every possible level."

[5]Hearings; Compare Schwartz testimony p. 160-163 with that of Mr. Rothwacks of the Justice Department, p. 216.

[6]Hearings (p. 241); statement of Mr. Arent, former chairman of the committee on procedure in fraud cases, section of taxation, American Bar Association, urging clarification of the voluntary disclosure pdicy and its retention.

APPENDIX A
Statutes Involved

Amendment 5 of the United States Constitution states as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Rule 41 (e) of the Federal Rules of Criminal Procedure provides as follows:

> "Rule 41. *Search and Seizure.*
>
> "(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant. * * * The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the

district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

Section 145 of the Internal Revenue Code provides in part as follows:

"(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	5
Conclusion	9
Appendix	10

CITATIONS

Cases:

Bram v. *United States*, 168 U.S. 532	5
Cobbledick v. *United States*, 309 U.S. 323	6
Eastus v. *Bradshaw*, 94 F. 2d 788, certiorari denied, 304 U.S. 576	6
Fried, In re, 68 F. Supp. 961, 161 F. 2d 453, certiorari granted, 331 U.S. 804, writ dismissed, 332 U.S. 807	7, 8
Hopt v. *Utah*, 110 U.S. 574	5
Liebster, In re, 91 F. Supp. 814	8
Steffanelli v. *Minard*, 342 U.S. 107	6
Wan v. *United States*, 266 U.S. 1	5
Watts v. *Indiana*, 338 U.S. 49	5
Wilson v. *United States*, 162 U.S. 613	5
White v. *United States*, 194 F. 2d 215, certiorari denied, 343 U.S. 930	8

Constitution and Statute:

Fifth Amendment	10
Internal Revenue Code, Sec. 145 (26 U.S.C. 1946 ed., Sec. 145)	11

Miscellaneous:

Federal Rules of Criminal Procedure, Rule 41	10

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 328

ANTHONY A. CENTRACCHIO, PETITIONER

v.

GEORGE F. GARRITY, UNITED STATES ATTORNEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court, filed on February 25, 1952 (R. 7-9), has not been reported. The opinion of the Court of Appeals (R. 53-64) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 25, 1952. (R. 64-65.) The petition for a writ of certiorari was filed on September 9, 1952. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether a federal district court has equitable jurisdiction, prior to complaint, arrest, indictment, or information, to determine the admissibility, in a potential future criminal prosecution for tax evasion, of voluntary statements made to revenue officials by the potential defendant.

STATUTE INVOLVED

This will be found in the Appendix, *infra*, p. 11.

STATEMENT

On February 20, 1952, before any arrest, search warrant, complaint, indictment, or other direct or ancillary criminal proceedings against him, petitioner filed a petition and motion to suppress evidence in the United States District Court for the District of Massachusetts. (R. 2-6.) The motion prayed that the United States Attorney be restrained from using before the grand jury, or in any criminal prosecution, certain evidence, comprising information obtained from petitioner's personal checks, bank accounts, clients' files and other material relating to income, including a question and answer statement given by him to the agents of the Bureau of Internal Revenue, and further prayed that the evidence be suppressed, but not that it be returned. (R. 6.)

The District Court heard testimony of petitioner and his accountant only,[1] and entered an order de-

[1] The United States Attorney stated that he had several witnesses to call, but the District Judge, after hearing petitioner's case, indicated that it was not necessary to hear testimony on the part of respondent, and no such testimony was offered. (R. 10-11, 38, 40, 55.)

nying the petition and motion. (R. 7.) The testimony was to the following effect: Upon learning of the voluntary disclosure policy of the Treasury Department,[2] and upon being assured by the Treasury agents that his case would be accepted on that basis, petitioner told revenue agents his returns were not in order, and supplied them with all the necessary data to compute the deficiencies. (R. 55.) He gave them access to his safe deposit box (R. 19, 44) and turned over to them his cancelled checks, bank statements and his check books (R. 19-20, 44); also, his case files as attorney at law (R. 25-26), information on his dividends, a rent analysis for his office, a statement of interest on deposits, and copies of his earlier income tax returns (R. 26). He appeared voluntarily at the agent's office, upon request of the agent, for the purpose of giving a statement. (R. 27.) He was placed under oath and questioned about various disbursements appearing on a written schedule previously supplied the agent. (R. 27-28.) During the course of the statement, he was asked if he waived his constitu-

[2] By agreement of the parties, the court took notice of the following voluntary disclosure policy of the Treasury Department, expressed in a statement of August 21, 1945, by then Secretary of the Treasury Vinson (R. 3-4):

> The Commissioner of Internal Revenue does not recommend criminal prosecution in the case of any taxpayer who makes a voluntary disclosure of omission or other misstatement in his tax return. Monetary penalties may be imposed for delinquency, for negligence and for fraud, but the man who makes a disclosure before an investigation is under way protects himself and his family from the stigma of a felony conviction. And there is nothing complicated about going to a collector or other revenue officer and simply saying, "There is something wrong with my return and I want to straighten it out."

tional rights, and after making reference to the alleged promise made him and the matter of cooperation, he stated "Yes, you can put it down in the record but remember". (R. 28.) At no time was petitioner in custody or under arrest.

On this record, the District Court found that there was no evidence presented by petitioner to show that at the time these disclosures were made the Treasury officials did in fact contemplate any criminal prosecution of petitioner, and that therefore there was no basis for a finding that the Treasury agents intended all along to break some promise or declaration of policy. Nor did they obtain from petitioner the evidence in question by fraudulent misrepresentation of their intention in that regard. (R. 7-9, 56.) The court also was of the opinion that the voluntary disclosure statement of the Secretary of the Treasury was a mere declaration of policy, in no sense promissory or binding, not conferring immunity. (R. 8, 56.) [3]

The Court of Appeals found that the petition and the evidence in support thereof did not disclose that petitioner had suffered any violation of his constitutional rights, and considered it doubtful that use of the evidence against him at trial would be a violation of his constitutional rights under the Fifth Amendment. The court thought (R. 62):

> that such questions as to the admissibility of evidence which may be produced by the gov-

[3] On February 21, 1952, one day after the District Court denied the petition and motion (R. 7), a grand jury handed down an indictment against petitioner charging tax evasion under 26 U.S.C. 145(b) (R. 56-7).

> ernment at some future criminal trial ought not to be determined by the district court, or by us on appeal, on a pre-indictment petition for the suppression of evidence such as the one filed in the case at bar.

The order of the District Court denying the petition was vacated and the case remanded with direction to enter an order dismissing the petition for want of equity. (R. 64-65.)

ARGUMENT

1. The shortest answer to petitioner's assertion that the decision of the court below is in conflict with this Court's decisions holding that the Fifth Amendment forbids the use in evidence of confessions induced by promises of advantage is that the Court of Appeals did not pass at all on the question of admissibility. That issue was expressly left for the court trying the criminal case (R. 62.) But we may also note that examination of the cases cited by petitioner (Pet. 10) discloses how different they are from the present case. In each instance the confession was obtained while defendant was in custody. In addition, in *Bram* v. *United States*, 168 U.S. 532, defendant was in irons; in *Wilson* v. *United States*, 162 U.S. 613, he was manacled; in *Wan* v. *United States*, 266 U.S. 1, he was kept incommunicado for seven days before making admissions, and was suffering from physical distress; in *Watts* v. *Indiana*, 338 U.S. 49, he was kept in solitary confinement; and in *Hopt* v. *Utah*, 110 U.S. 574, he was under arrest. On the instant record, there is no evidence that petitioner made any

statements or admissions under remotely similar circumstances. To the contrary, at the time he made his admissions he was a completely free agent. He was not under arrest, confined, or detained, nor was his freedom of movement hampered in any manner. No force or duress was used against him. His statements were given freely and voluntarily.

2. Even if petitioner were somehow induced by promises to make incriminating statements or confessions in violation of his rights, the attempt to determine the admissibility of such statements prior to indictment is premature and constitutes an innovation in criminal procedure which is unsupported by decisions in federal or state courts. *Eastus* v. *Bradshaw*, 94 F. 2d 788 (C.A. 5), certiorari denied, 304 U.S. 576. Not only would the recognition of the right to seek this kind of relief impose a grave burden on prosecutors and the judiciary (R. 61-2), but since it would carry the right of appeal there would also be serious inroads upon the principle of finality "forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy". *Cobbledick* v. *United States*, 309 U.S. 323, 325. Cf. *Steffanelli* v. *Minard*, 342 U.S. 107, especially at pp. 123-124.

Moreover, petitioner has a choice of adequate remedies at law in the course of the litigation on his indictment. He may move to supress evidence allegedly obtained illegally, or object to its admissibility at trial, and he may appeal from a judgment of conviction based upon illegal evidence. There is, therefore, clearly no need for an inter-

ference by equity with the normal administration of the criminal law.

3. Petitioner contends, however, that the decision of the court below is in conflict with *In re Fried,* 161 F. 2d 453 (C.A. 2d), certiorari granted, 331 U.S. 804, writ dismissed, 332 U.S. 807. That case involved, in part, an application for the suppression of all information disclosed and admissions made by Fried and his employees as a result of long continued interrogation of him and others, after arrest but prior to indictment, and while their arraignments were delayed. The District Court declined to hear testimony on the motion to suppress the confessions on the ground that the application therefor was premature. (68 F. Supp. 961 (S.D.N.Y.)) The Court of Appeals, Judge Augustus N. Hand dissenting, reversed this part of the District Court's judgment and remanded the cause with directions to hold a hearing as to whether the confessions and admissions were obtained in violation of the Constitution. The judges agreed that such motions, if allowed, would impose a heavy burden on prosecuting officers and the courts, and even the majority was unable to agree upon the scope of the relief which should be granted.

The court below properly distinguished the *Fried* case from the case at bar, "for here it is clear that there has been no coerced confession by petitioner in violation of his constitutional right. The information supplied by petitioner was voluntarily given to aid in the computation of his income tax

liability". (R. 60-61.) It also pointed out that "The petition, and petitioner's evidence in support thereof, did not disclose that petitioner had yet suffered any violation of his constitutional rights, either under the Fourth or Fifth Amendment". (R. 62.)

The *Fried* case can be further distinguished in that a complaint had there been filed with the United States Commissioner, a warrant of arrest issued, and Fried placed under arrest prior to questioning. In the case at bar, no proceedings of any nature whatsoever had been initiated by the Government prior to the voluntary admissions of petitioner, nor prior to the filing of the motion and petition to suppress.[4]

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[4] The cases of *In re Liebster*, 91 F. Supp 814 (E.D. Pa.), and *White* v. *United States*, 194 F. 2d 215 (C.A. 5th), certiorari denied, 343 U.S. 930, are no authority for petitioner's argument for the reason that they were decided solely upon questions relating to the claimed voluntary disclosures. The issue of prematureness of the motions was not raised by the Government nor commented upon by the court in either case.

CONCLUSION

The decision of the court below is correct and presents no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER, 1952

APPENDIX

CONSTITUTION OF THE UNITED STATES, FIFTH AMENDMENT

No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

FEDERAL RULES OF CRIMINAL PROCEDURE:

Rule 41. SEARCH AND SEIZURE.

* * * * *

(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant * * *. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

* * * * *

INTERNAL REVENUE CODE:

Sec. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1946 ed., Sec. 145.)

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